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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. REFUGIO RINCON, Appellant.	)	2 CA-CR 2010-0191 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200600015

Honorable Boyd T. Johnson, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 In this appeal from his manslaughter conviction, appellant Refugio Rincon argues the trial court erred in admitting a hearsay statement under the exception for excited utterances and in excluding the testimony of a witness who had asserted his Fifth Amendment privilege against self-incrimination. For the following reasons, we affirm.

Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict[]." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In 2005, Rincon, who was known by the nickname "Cuco," lived with his girlfriend, Tina Williams, in a mobile home situated on a multiple-acre property. Tina testified that twenty to thirty other people lived on the property, including L., the victim in this case, and his brother J.

¶3 During the night of November 8, 2005, or early the next morning, Rincon woke Williams and told her to get up and get dressed. He told her they had to leave because the police were going to be coming, and he mentioned the victim's name. The two left in Williams's car and drove to Rincon's friend's house approximately five miles away. While driving there, Rincon told Williams that L. had tried to steal the truck Rincon had been working on, that Rincon had hit L. in the head with his gun, "it went off," and that L. was dead.

¶4 Early on the morning of November 9, other residents saw J. searching for his brother on the property. Shortly after J. went to an area where vehicles were parked, residents heard him screaming. Ybrahim Rocha, the property owner, testified that a

resident woke him at 5:30 a.m. and told him that "somebody killed a guy." Rocha went with J. to see L.'s body and afterward called 9-1-1.

¶5 After Rincon was apprehended in California, he was charged with second-degree murder. A jury found him guilty of the lesser-included offense of manslaughter and the trial court sentenced him to a prison term of 10.5 years. This appeal followed.

Discussion

I. Hearsay Statement

¶6 Rincon first contends the trial court abused its discretion in admitting a hearsay statement made by J. because there was insufficient foundation to establish that it qualified as an excited utterance and that its admission violated his constitutional right to confront his accuser. Rincon objected on hearsay grounds below and we therefore review the trial court's ruling for an abuse of discretion. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003). Because we conclude Rincon did not properly preserve his Confrontation Clause claim below, we review that claim solely for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005).

¶7 Rocha testified that on the morning L.'s body had been discovered, and before 9-1-1 had been called, J. had stated, "[m]y brother was killed, my brother was killed. Cuco killed my brother, Cuco killed my brother." The court admitted the statement on the ground that it constituted an excited utterance, overruling Rincon's hearsay objection and his argument that there was insufficient foundation to admit it.

A. Foundation

¶8 Because J.'s utterance was an out-of-court statement offered for "the truth of the matter asserted," it was hearsay. *See* Ariz. R. Evid. 801(c). It was therefore inadmissible unless it fell within at least one of the recognized exceptions to the rule precluding admission of hearsay evidence, which exceptions are enumerated in Rule 803, Ariz. R. Evid. *See State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). Rule 803(2) provides the exception for excited utterances.

¶9 A statement qualifies as an excited utterance if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ariz. R. Evid. 803(2). This hearsay exception requires proof of: "(1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Bass*, 198 Ariz. 571, ¶ 20, 123 P.3d 796, 802 (2000). The declarant also must have personally observed the event about which he spoke. *Id.* Rincon first contends the state did not provide sufficient evidence to establish that L. had made the statement while under the stress of excitement. He argues that the only evidence of excitement was Rocha's testimony that J. had "appear[ed] to be emotional" and had been expressing emotion about "[h]is brother's death."

¶10 Contrary to Rincon's assertion, Rocha's testimony was not the only evidence of J.'s stress. Pinal County Sheriff's Deputy Roderick Harrison testified he had arrived at the property at about 7:20 a.m. and shortly thereafter had spoken with J., who was sitting down and crying. He described J. as "very distraught . . . very emotional . . .

[and] shaking a little bit." Harrison testified, "[y]ou could tell he was emotionally upset . . . [a]nd I got the indication he had been through a traumatic experience during that time frame . . . ." Harrison described the victim's body as having "serious head trauma where brain matter and part of the scalp and parts of the cranium had been obliterated on the left side of his head and [were] protruding out."

¶11 Additionally, Daniel Pacheco, a sheriff's deputy at the time but subsequently promoted to detective, arrived on the property after Harrison and testified that "[J.] had his elbows on his knees and his hands on his head . . . his eyes were really red, [and it] looked like he'd been crying." Pacheco also testified that J. had continued to cry while speaking with him. Based on Rocha's description of J. immediately after he discovered his brother was dead and both deputies' descriptions of J.'s continuing emotional distress in the hours after J. discovered his brother's body, the trial court had sufficient evidence to conclude that J. had been subject to a startling event at the time he made his statement to Rocha.

¶12 The evidence established J. had made the statement almost immediately after the startling event—the discovery of his brother's body. Based on Rocha's testimony, it appears J. had made the contested statement as Rocha left his house at approximately 5:30 a.m. Furthermore, the statement need not be made immediately after the event if the declarant is still under the stress of excitement caused by the event. *State v. Rivera*, 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984). "'Testimony that the declarant still appeared "nervous" or "distraught" and [that] there was a reasonable basis for continuing emotional upset will often suffice.'" *Id., quoting* McCormick, *Evidence*

§ 297 at 706 (2d ed. 1972) (emphasis omitted). Because J. made his statement almost immediately after seeing his brother's body and while he was experiencing emotional distress, the trial court did not abuse its discretion in implicitly concluding the statement was made before he had time to fabricate or reflect. *See* Ariz. R. Evid. 803(2).

¶13 As to the third requirement for an excited utterance, the evidence supported the trial court's implicit finding that J.'s statement related to the startling event. Shortly before he made the statement, J. had discovered his brother's body in the condition described by Deputy Harrison. Though the basis for his belief that "Cuco killed my brother" is not entirely clear, the statement did relate to the discovery of his brother's body. *See State v. Cruz*, 218 Ariz. 149, ¶¶ 53, 55, 181 P.3d 196, 208 (2008) (finding statement "Arturo Sandoval is the person who shot the officer" related to the startling event of shooting of a police officer). Accordingly, we find no error here.

¶14 Finally, we consider whether J. personally observed the event about which he spoke. *State v. Dixon*, 107 Ariz. 415, 418, 489 P.2d 225, 228 (1971). The portion of J.'s statement, "[m]y brother was killed . . ." is clearly based on his personal observation because he saw his brother's body. But there was no evidence that the utterance ". . . Cuco killed my brother" was based on J.'s personal observation. In the absence of any evidence that J. had observed his brother's murder, the trial court erred in admitting this portion of the statement. *See id.* (finding error in admission of utterance regarding identity of shooter when the declarant was not in a position to observe who shot the victim).

¶15 Although we find error, given the weight of the evidence available to the jury, we conclude the error was harmless and does not require reversal. *See Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d at 805 (erroneously admitted evidence reviewed for harmless error). "Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury's verdict." *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004). "'The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993), *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original).

¶16 Evidence of Rincon's guilt included the following: Rincon's statement to Williams that he shot L.; a business card with the name "Cuco" written on it found at the scene of the murder; Rincon's deoxyribonucleic acid, or DNA, on a beer can and cigarette butt found at the scene; Williams's description of Rincon's flight immediately after the murder; Rincon's reputation for carrying a handgun; and inconsistencies between Rincon's testimony at trial and his statements to law enforcement officers.

¶17 The record before us establishes beyond a reasonable doubt that J.'s improperly admitted statement did not affect the verdict. Consequently, we have no basis for disturbing the conviction. *See State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001) (court will not reverse conviction on appeal "if an error is clearly harmless"), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998).

B. Confrontation Clause

¶18 Rincon also alleges that the admission of J.'s statement violated his constitutional right to confront his accuser. The state argues that Rincon forfeited this argument by failing to object to the admission of the statement on this ground before the trial court. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607. Rincon contends he preserved the Confrontation Clause issue by objecting to the admission of the statement on hearsay grounds. But "[a] 'hearsay' objection does not preserve for appellate review a claim that admission of the evidence violated the Confrontation Clause." *State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006).

¶19 Alternatively, in a confusing argument, Rincon claims he invoked a Confrontation Clause challenge to the statements by objecting to the court's ruling on the state's motion in limine to preclude the testimony of border patrol agents about J.'s availability to testify at trial. But that objection was insufficient because it was made well after the court ruled on and admitted J.'s statement that "Cuco" had killed his brother. To preserve an issue for review, a sufficient objection must be made to give the trial court the opportunity to consider and rule on the objection. *State v. Kinney*, 225 Ariz. 550, ¶ 7, 241 P.3d 914, 918 (App. 2010); *see also State v. Lichon*, 163 Ariz. 186, 190, 786 P.2d 1037, 1041 (App. 1989) (argument not preserved for appeal when defendant failed to make contemporaneous objection).

¶20 Because Rincon did not object on this ground below, he has forfeited the right to seek relief for all but fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Rincon must establish the error was fundamental in nature and that it was

prejudicial. *See State v. Lopez*, 217 Ariz. 433, ¶ 7, 175 P.3d 682, 684 (App. 2008). Because Rincon failed to argue on appeal that the trial court committed fundamental error in admitting J.'s statement, he has waived fundamental error review as well. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued). Although we will not ignore fundamental error if we find it, no such error is apparent. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

II. Testimony of Arlie Perryman

¶21 Finally, Rincon contends that the trial court violated his constitutional right to confront his accuser, by disallowing the testimony of Arlie Perryman. A Pinal County Sheriff's detective had interviewed Perryman regarding L.'s death. Based on this interview, the detective concluded Perryman had been either a witness to, or the perpetrator of, the crime. But the interview did not shift the focus from Rincon as the primary suspect.

¶22 During trial and out of the presence of the jury, Perryman testified that he had been subpoenaed as a witness in Rincon's trial and that, upon the advice of counsel, he intended to invoke his Fifth Amendment privilege against self-incrimination rather than answer any questions regarding L.'s death. The trial court concluded that because Perryman intended to assert the privilege as to all relevant questions, he could not be compelled to testify. The court refused to allow Rincon to call Perryman as a witness knowing that he would invoke his privilege before the jury.

¶23 Rincon did not object below to the trial court's ruling that Perryman could not be compelled to testify and need not be called as a witness only to invoke the privilege in the presence of the jury. Accordingly, we review only for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Rincon bears the burden of demonstrating fundamental, prejudicial error. *Lopez*, 217 Ariz. 433, ¶ 7, 175 P.3d at 684. But because Rincon failed to argue fundamental error as to this issue, he has waived review. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

¶24 And, in any event, we find no error, much less fundamental, prejudicial error. It was apparent to the trial court that Perryman intended to invoke his Fifth Amendment privilege against self-incrimination as to all questions concerning the murder. If a witness properly invokes his Fifth Amendment privilege "'the defendant's right to compulsory process must yield to the witness's privilege not to incriminate himself.'" *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 10, 42 P.3d 1177, 1181 (App. 2002), *quoting State v. Mills*, 196 Ariz. 269, ¶ 31, 995 P.2d 705, 712 (App. 1999); *see also State v. Cornejo*, 139 Ariz. 204, 208, 677 P.2d 1312, 1316 (App. 1983) ("citizen should not be faced with criminal prosecution in order to prove the innocence of [another]"). Further, "'[i]f upon conducting an in camera hearing the trial judge determines that a witness could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating an individual's Sixth Amendment right to compulsory process.'" *State v. Harrod*, 218 Ariz. 268, ¶ 20, 183 P.3d 519, 527 (2008), *quoting State v. McDaniel*, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017

(1989). The court did not err in ruling that Perryman could not be compelled to testify and need not be called as a witness only to invoke the privilege in the presence of the jury.

Disposition

¶25 The conviction and sentence imposed are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge